

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of WINDSOR SQUARE DEVELOPMENT, INC., a corporation,

Bankrupt,

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation,

Bankrupt,

vs.

MARGARET B. BARRINGER; PHOENIX TITLE AND TRUST COMPANY, a corporation; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT & POWER COMPANY, a corporation; COUNTY OF MARICOPA; STATE OF ARIZONA; JOHN D. CALHOUN, COUNTY TREASURER OF THE COUNTY OF MARICOPA, STATE OF ARIZONA; MITT SIMS, TREASURER OF THE STATE OF ARIZONA; W. R. WELLS; RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE; GLEN E. WEAVER; E. R. FOUTZ; LUCILLE NICHOLS; NELLIE B. WILKINSON and SUSIE M. WALLACE, and THOMAS J. TUNNEY (Alleged Lien-Holders)

4
No. 7765

MOTION OF APPELLEE, CENTRAL ARIZONA LIGHT AND POWER COMPANY, A CORPORATION, TO DISMISS OR AFFIRM APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, AND BRIEF AND ARGUMENT ON SAME.

FILED

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RIVER VALLEY WATER USERS' ASSOCIA-
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LIGHT & POWER COMPANY, a corporation;
COUNTY OF MARICOPA; STATE OF ARI-
ZONA; JOHN D. CALHOUN, COUNTY TREAS-
URER OF THE COUNTY OF MARICOPA,
STATE OF ARIZONA; MITT SIMS, TREAS-
URER OF THE STATE OF ARIZONA; W. R.
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B. WILKINSON and SUSIE M. WALLACE, and
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MOTION OF APPELLEE, CENTRAL ARIZONA
LIGHT AND POWER COMPANY, a corporation,
TO DISMISS OR AFFIRM APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

COMES now CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation, appellee herein, by Armstrong, Kramer, Morrison & Roche, its counsel, and moves this Court to dismiss, with costs, the appeal herein taken to this Court by Margaret B. Barringer and Phoenix Title & Trust Company, as Trustee, upon the following grounds:

That this Court is without jurisdiction to hear and determine the appeal herein attempted to be prosecuted by Margaret B. Barringer and the Phoenix Title & Trust Company, a corporation, for the reason that this appellee, Central Arizona Light and Power Company, a corporation, was not made a party to the petition for review of the decree of the Referee in Bankruptcy entered in the above-entitled cause and dated September 17, 1932, and filed in the office of the Referee in Bankruptcy on the 27th day of September, 1932 (T.R. 259, 353), although the said decree from which the petition for review was taken to the District Court of the United States in and for the District of Arizona provided specifically, among other things, for the adjudication and fixing of the rights of the appellee, Central Arizona Light and Power Company, a corporation, in and to certain rights of way and easements in and upon the property of the bankrupt, Windsor Square Development, Inc.

That this is so for the following reasons:

That the appellee, Central Arizona Light and Power Company, a corporation, was a necessary party to said petition for review, in that at the time of the adjudication in bankruptcy it had received from the bankrupt

rights of way over all the streets laid out in the bankrupt's property and easements for the location of poles and wires on all of the streets and across a number of the lots in said property, and upon the hearing before the Referee in Bankruptcy on the petition of the trustee for the fixing and marshalling of all liens upon the bankrupt's property it was stipulated between the Trustee in Bankruptcy and the appellee, Central Arizona Light and Power Company, a corporation, that the title to the said rights of way and easements should be confirmed by the Referee in Bankruptcy, and in the decree fixing and marshalling the liens upon the bankrupt's property the title to the said rights of way and easements were confirmed and settled in the appellee, Central Arizona Light and Power Company, a corporation.

That thereafter, on the 29th day of September, 1932, a petition for review of the said decree was filed with the Referee in Bankruptcy, and this appellee, Central Arizona Light and Power Company, a corporation, together with certain other appellees, was not made a party to the petition for review, nor was there any notice given to the appellee, Central Arizona Light and Power Company, a corporation, that said petition for review was filed.

On the same day, September 29, 1932, Phoenix Title and Trust Company, a corporation, filed its petition for review, in which the appellee, Central Arizona Light and Power Company, a corporation, was not joined as a party, and of which petition for review no notice was given to the appellee, Central Arizona Light and Power Company, a corporation.

On November 3, 1932, the Referee in Bankruptcy filed his certified record on review in the District Court of the United States, in and for the District of Arizona, and the appellee, Central Arizona Light and Power Company, a corporation, not being made a party to said petition for review, received no notice of the filing of said certified record on review. Upon the hearing before the Judge of the District Court of the United States for the District of Arizona, appellee, Central Arizona Light and Power Company, a corporation, received no notice nor was it represented.

Thereafter, on December 6, 1932, the petitioners moved to strike the Referee's summary of evidence, and no notice of that proceeding, either by the appellant, Margaret B. Barringer, or the appellant, Phoenix Title and Trust Company, was given to this appellee, Central Arizona Light and Power Company, a corporation.

On December 13, 1934, the decree of the Referee, fixing and marshalling liens filed on September 27, 1932 was approved and affirmed by the Judge of the District Court of the United States for the District of Arizona, and thereafter, on December 17, 1934, an order was entered, vacating the said order of approval, and on January 7, 1935, a further order, again approving the Referee's decree fixing and marshalling liens, was entered in the United States District Court. No notice from either the Court or the appellants herein of any one of these three orders of the United States District Court was served upon this appellee.

That insofar as this appellee, Central Arizona Light

and Power Company, a corporation, is concerned, it has not been before the Court at any time during the proceedings beginning with the petition for review and ending with the order affirming the decree of the Referee in Bankruptcy entered by the Judge of the United States District Court in and for the District of Arizona; that it had at all times a beneficial interest in the property of the bankrupt affected by the decree of the Referee in Bankruptcy, in that its title and rights in and to those certain easements and rights of way set forth in the decree were confirmed and vested in this appellee by said decree.

It is true that upon the approval and confirmation of the Referee's decree by the Judge of the United States District Court the appellants then, by serving a citation and notice of appeal and purported assignments of error, sought to make this appellee a proper party to this appeal, but even then they did not take the necessary steps to properly make this appellee a party to the appeal to this Court, for the reason that said appellants failed to give any notice to this appellee of the hearing to approve the statement of evidence set for May 18, 1936, nor did the said appellants give any notice to this appellee of their motion to continue the same to May 25, 1936, nor did said appellants give any notice of the final settling of the evidence introduced in the cause, which occurred on October 29, 1936.

WHEREFORE, this appellee, Central Arizona Light and Power Company, a corporation, asks this Honorable Court to dismiss the appeal filed by Margaret B.

Barringer and the Phoenix Title and Trust Company,
a corporation, appellants.

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MOTION TO AFFIRM

And in the alternative, the said appellee, Central Arizona Light and Power Company, a corporation, also moves this Court to affirm the said judgment and decree entered by the District Court of the United States for the District of Arizona, confirming and approving the decree of the Referee originally entered on December 13, 1934, vacated on December 17, 1934, and reentered on January 7, 1935, with costs to this appellee, on the ground that it is manifest that no

proper appeal from said order has been taken by the appellants, Margaret B. Barringer and the Phoenix Title and Trust Company, a corporation, against this appellee, either on their petition to review to the United States District Court or upon their appeal to this Court.

THOS. ARMSTRONG, JR.

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UNITED STATES OF AMERICA
DISTRICT AND STATE OF ARIZONA } ss.
COUNTY OF MARICOPA

FRANK J. DUFFY, being duly sworn, doth depose and say: That I am one of the attorneys for the Central Arizona Light and Power Company, a corporation. I have read the within Motion to Dismiss, and in the alternative, Motion to Affirm, in the above entitled matter and know the contents thereof; and that

the statements contained therein are true, according to the best of my knowledge, information and belief.

FRANK J. DUFFY

Subscribed and sworn to before me this day of April, A. D. 1937.

R. E. CONGER

*Notary Public in and for
Maricopa County, Arizona*

(SEAL)

My commission expires
January 15, 1939.

STATEMENT OF FACTS RELATING TO MOTION
TO DISMISS AND MOTION TO AFFIRM

On October 25, 1930 a petition in bankruptcy was filed, asking that the Windsor Square Development, Inc., a corporation, be adjudicated a bankrupt, and on the 28th day of October, 1930, the said Windsor Square Development, Inc. was adjudicated a bankrupt.

On June 8, 1931 the Trustee filed a petition to fix and marshal liens, and thereafter answers were filed as follows: County Treasurer, Maricopa County, August 26, 1931; W. R. Wells, August 31, 1931; Raymond Nier, September 2, 1931; J. Allen Wells, September 2, 1931, and Salt River Valley Water Users' Association, September 2, 1931.

This appellee in due time entered into a stipulation with the Trustee in Bankruptcy by which it was agreed that in any order or decree entered by the Referee in Bankruptcy there would be entered an order confirming the title of this appellee to its rights of way and easements as the same appeared on the plat or map of record of the Windsor Square Development, Inc., a corporation, the bankrupt, in the records of the Recorder's office of Maricopa County, Arizona.

The appellees, Margaret B. Barringer and Phoenix Title and Trust Company, a corporation, Trustee, also filed answers to the petition, and on the 17th day of September, 1932, the Referee signed a decree fixing and marshalling all liens on the said property of the bankrupt, to which exceptions were filed by Margaret B. Barringer on September 28, 1932, and exceptions on behalf of the Phoenix Title & Trust Company, a corporation, as Trustee, were filed on September 29, 1932. On the same date a petition for review by Margaret B. Barringer and the Phoenix Title and Trust Company was filed, in which no one of the parties named herein or this appellee were made parties, except the Trustee in Bankruptcy. No notice was given to this appellee in any of the proceedings before the District Court, nor was it represented at any of the hearings. The first notice it received of anything pertaining to the appeal was a copy of the petition, which appeal, assignments of error, order allowing appeal with supersedeas, and supersedeas, and a citation to appear before this Honorable Court in the appeal of Margaret B. Barringer and the Phoenix Title and Trust Company, a corporation, Trustee, all of which said papers were dated February 5, 1935 and re-

ceived on the 7th day of February, 1935 by this appellee.

Thereafter, and on the 21st day of October, 1935, a citation issued out of this Court under the signature of the Honorable Curtis D. Wilbur, U. S. Circuit Judge, was served upon this appellee, and on the 6th day of March, 1936 a praecipe for transcript of record was served on this appellee. It did not, however, receive any notice whatsoever of filing the proposed statement of evidence, no notice of the date for settling the proposed statement of evidence, no notice of the final settling and signing of the statement of evidence by the Judge of the United States District Court.

BRIEF OF THE ARGUMENT

It is a settled rule of Federal Court procedure that all parties affected by a ruling must be joined in an appeal therefrom, and that if the appellant fails to do so the appeal should be dismissed.

Hartford Accident & Indemnity Company vs. O. L. Bunn, 285 U. S. 169; 76 L. Ed. 685.

The Supreme Court held in the above case that where parties having an interest in the subject matter of a judgment are not joined in an appeal, the appellate court will not review the same but will, upon motion, dismiss the appeal.

“Petitions for review brought the matter before the lower court, where the matter was heard, resulting in the entry of a decree and order confirm-

ing the order of the referee and dismissing the petitions for review.

The mortgages referred to all covered the same property and chronologically were first, second, and third mortgages. Appeals were perfected by the owner of the first mortgage and the owner of the second mortgage, but the owners of the third mortgage have not prosecuted a separate appeal, nor joined in the appeals of the other mortgagees; neither were there proceedings by summons or severance.

Appellee moves to dismiss the appeals on the ground that there is a fatal defect in parties appellant. We think the matter is governed by the following controlling decisions of the Supreme Court and this court: *Hartford Accident, etc. Co. v. Bunn*, 285 U. S. 169, 52 S. Ct. 354, 76 L. Ed. 685; *McLean v. Jaffray et al.* (C.C.A. 8) 71 F. (2d) 743; *Partridge v. Clarkson* (C.C.A. 8) 72 F. (2d) 108; *Arkansas Anthracite Coal & Land Co. v. Stokes* (C.C.A. 8) 2 F. (2d) 511; *Grand Island & W. C. R. Co. v. Sweeney* (C.C.A. 8) 103 F. 342; *Grand Island & W. C. R. Co. v. Sweeney* (C.C.A. 8) 95 F. 396.

The motions to dismiss are therefore sustained, and the appeals accordingly dismissed.”

Sharp v. Haney,
78 Fed. (2d) 195

To the same effect see:
McLean v. Jaffray, et al.,
71 Fed (2d) 743.

Partridge v. Clarkson, et al,
72 Fed. (2d) 108.

It is only where the interest of a party is separate and distinct from rights of other parties that an appeal from the Referee's ruling will stand without joining all other parties affected by the appeal.

Bonner v. Cannon,
60 Fed. (2d) 228 (10th Circuit)

There is no attempt in the appeal to separate in the manner provided by law the rights of the interested parties, and a decision on the merits of the appeal by this Court would necessarily reverse the rights vested in this appellee by the decree of the Referee and the order of the United States District Court confirming the same.

If an appeal or petition for review is not taken in open court, the appeal will be dismissed if beneficially interested parties are not joined.

Taylor v. Leesnitzer,
220 U. S. 90; 55 L. Ed. 382.

Canal Bank & Trust Co. v. Brewer,
18 Fed. (2d) 93.

ARGUMENT

It is the belief of appellee that the motion to dismiss should be granted, for the reason that this appellee has never had the benefit of due process of law in the proceedings in this case up to the time that the appeal to this Honorable Court was initiated. Even then, though it was served with citations on appeal and a praecipe for the transcript of the record on appeal, it was not made a party to the proceedings in perfecting the appeal, particularly in regard to the settling of the statement of evidence.

The record shows that no notice of the date of hearing of the settlement of evidence was given this appellee, nor was any notice of the continuance thereof given, nor did this appellee receive notice of the final hearing, if such a hearing was held, and the settlement of the evidence in the case. The record as it appears in the transcript of record and as referred to in the statement of facts herein, shows that this appellee has been deprived of the due process of law guaranteed under the Constitution, in that it was never given the right, as provided by law, to protect its interests in the various steps from the time of the decree of the Referee in Bankruptcy to the attempted perfection of this appeal by the appellants.

In the light of the decisions cited in our brief as to the necessity of inclusion of all parties interested in a judgment from which an appeal is sought to be taken, we submit that in the instant case the failure of the

appellants to follow the rule laid down is fatal, and respectfully request that this appeal be dismissed.

Respectfully submitted,

THOS. ARMSTRONG, JR.

R. WM. KRAMER

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